Supreme Court, U.S.
FILED
FEB 4 - 2005
OFFICE OF THE CLERK

(2)

No. 04-775

IN THE
Supreme Court of the United States

BLAINE COUNTY, MONTANA; DON K. SWENSON, ARTHUR KLEINJAN, and MARY DELORES PLUMAGE, *et al.*,

Petitioners,

vs.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief of Private Respondents in Opposition to Petition for Writ of Certiorari

LAUGHLIN MCDONALD
Counsel of Record
NEIL BRADLEY
BRYAN SELLS
MEREDITH E.B. BELL
ACLU Foundation, Inc.
2725 Harris Tower
233 Peachtree Street
Atlanta, GA 30303
(404) 523-2721

JIM VOGEL
P.O. Box 525
Hardin, MT 59034

Counsel for Private Respondents

QUESTIONS PRESENTED

1. Whether the lower court erred in following the decisions of this Court upholding the constitutionality of, and applying, Section 2 of the Voting Rights Act?

2. Whether this Court, absent a very obvious and exceptional showing of error, should review the concurrent findings of fact by two courts below that at-large elections for the Blaine County Board of Commissioners diluted American Indian voting strength in violation of Section 2 of the Voting Rights Act?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF FACTS 1

SUMMARY OF THE ARGUMENT 3

REASONS FOR DENYING THE PETITION 4

I. Section 2 Has Been Held To Be Constitutional and Has Been Repeatedly Applied by This Court . 4

II. There Is no Conflict with the Second Circuit . . . 7

III. The Decision of the Ninth Circuit Is Not in Conflict with *Boerne* Through *Lane* 8

A. The Court of Appeals Properly Applied the *Boerne* Line of Cases 14

IV. The Legislative History Strongly Supports the Constitutionality of Section 2 14

A. Congress May Dispense with Proof of a Discriminatory Purpose 21

V. Racial Bias Was Shown to Exist But Is not a Prerequisite for a Finding of Vote Dilution . . . 24

A. The Record Clearly Establishes Political Cohesion 28

VI. The Concurrent Findings of Two Courts Below of a Section 2 Violation Were not "Very Obvious and Exceptional Error" 29

CONCLUSION 30

APPENDIX 1a

TABLE OF AUTHORITIES

CASES Page

Abrams v. Johnson, 521 U.S. 74 (1997) 6

Blackfeet and Fort Belknap Reservations in the State of Montana v. United States, 81 Ct. Cl. 101 (1935) 25

Blum v. Bacon, 457 U.S. 132 (1982) 2

Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356 (2001) 9, 12, 14

Bone Shirt v. Hazeltine, 336 F. Supp. 2d 976 (D.S.D. 2004).. 20

Buckanaga v. Sisseton Independent School District No. 54-5, 804 F.2d 469 (8th Cir. 1986). 20

Bush v. Vera, 517 U.S. 952 (1996) 8

Charleston County, S.C. v. United States, 365 F .3d 341 (4th Cir. 2004) 7

Charleston County, S.C. v. United States, 125 S. Ct. 606 (2004) 7

Chisom v. Roemer, 501 U.S. 380 (1991) 6

City of Boerne v. Flores, 521 U.S. 507 (1997) . . . . . passim

City of Rome v. United States, 446 U.S.156 (1980) 7, 10, 23

Civil Rights Cases, 109 U.S. 3 (1883) 9

Collins v. City of Norfolk, Va., 816 F.2d 932 (4th Cir. 1987). 27

Cuthair v. Montezuma-Cortez, Colorado School District No. RE-1, 7 F.Supp. 2d 1152 (D.Col. 1998) 20

Emery v. Hunt, 272 F.3d 1042 (8th Cir. 2001) 20

Employment Div., Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990) 10

Exxon Co., U.S.A. v. Sofec, Inc., 517 U.S. 830 (1996) . . 29

Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank, 527 U.S. 627 (1999) 8, 11, 14

Fullilove v. Klutznick, 448 U.S. 448 (1980) 19

Gaston County v. United States, 395 U.S. 285 (1969) . 7, 23

Georgia v, Ashcroft, 539 U.S. 461 (2003) 6

Goodluck v. Apache County, 417 F.Supp. 13 (D.Ariz.1975). 18

Graver Tank & Mfg. Co. v. Linde Air Products Co., 336 U.S. 271 (1949) 29

Growe v. Emison, 507 U.S. 25 (1993) 6

Hicks v. Miranda, 422 U.S. 332 (1975) 5

Holder v. Hall, 512 U.S. 874 (1994) 6

Houston Lawyers' Ass'n v. Atty. Gen. of Texas, 501 U.S. 419 (1991) 6

Johnson v. De Grandy, 512 U.S. 997 (1994) 6, 29

Jones v. City of Lubbock, 727 F.2d 364 (5th Cir. 1984) . . . 8

Jordan v. Winter, 604 F.Supp. 807 (N.D.Miss. 1984) 5

Katzenbach v. Morgan, 384 U.S. 641 (1966). . . . 5, 7, 12, 22

Kimel v. Florida Board of Regents, 528 U.S. 62 (2000) .8, 11

Klahr v. Williams, 339 F. Supp. 922 (D.Ariz. 1972) 17

Lassiter v. Northampton County School Board of Elections, 360 U.S. 45 (1959) 22

LULAC v. Clements, 986 F.2d 728 (5th Cir. 1993) 7

Mandel v. Bradley, 432 U.S. 173 (1977) 5

Massachusetts Mut. Life Ins. Co. v. Ludwig, 426 U.S. 479 (1976) 2

McCulloch v. Maryland, 17 U.S. 316 (1819). 23

Mississippi Republican Executive Committee v. Brooks, 469 U.S. 1002 (1984) 5, 6

Mixon v. Ohio, 193 F.3d 389 (6th Cir. 1999) 8

Muntaqin v. Coombe, 366 F.3d 102 (2d Cir. 2004) 7

Muntaqin v. Coombe, 2004 WL 2998551 (2d Cir. (N.Y.)) . 7

Nevada Department of Human Resources v. Hibbs, 538 U.S. 721 (2003) 9,14

Old Person v. Cooney, No. CV-96-004-GF (D.Mont. Oct. 27, 1998) 25

Old Person v. Cooney, 230 F.3d 1113 (9th Cir. 2000) . 20, 25

Oregon v. Mitchell, 400 U.S. 112 (1970) ..... passim

Reno v. Bossier Parish School Board, 520 U.S. 471 (1997) .6

Richardson v. Ramirez, 418 U.S. 24 (1974) 7

Ruiz v. City of Santa Maria, 160 F.3d 543 (9th Cir. 1998) .27

Sanchez v. Colorado, 97 F.3d 1303 (10th Cir. 1996) . . 7, 27

Smith v. Salt River Project Agr. Imp. and Power Dist., 109 F.3d 586 (9th Cir. 1997) 27

South Carolina v. Katzenbach, 483 U.S. 301 (1966) 5, 7, 12, 14, 22

Stabler v. County of Thurston, Neb., 129 F.3d 1015 (8th Cir. 1997) 20

Tennessee v. Lane, 124 S. Ct. 1978 (2004) 9, 13

Thornburg v. Gingles, 478 U.S. 30 (1986) . . . . . passim

United States v. Bartleme, Wis., Civ. No. 78-C-101 (E.D.Wis. 1978) 18

United States v. Blaine County, Montana, 363 F.3d 897 (9th Cir. 2004) 1, 8

United States v. Board of Supervisors of Thurston County, Neb., Civ. No. 79-0-380 (D.Neb. 1979) 18

United States v. Humboldt County, Nev., Civ. No. R 70-0144 HEC (D.Nev. 1979) 18

United States v. San Juan County, Civ. No. 79-507 (D.N.M. 1979) 18

United States v. Marengo County Commission, 731 F.2d 1546 (11th Cir. 1984) 7

United States v. Morrison, 529 U.S. 598 (2000) . . . 9, 12, 14

Voinovich v. Quilter, 507 U.S. 146 (1993) 6

Whitcomb v. Chavis, 403 U.S. 124 (1971) 27

White v. Regester, 412 U.S. 755 (1973) 27

Windy Boy v. County of Big Horn, 647 F.Supp. 1002 (D.Wyo. 1986) 20, 27

CONSTITUTIONAL PROVISIONS

Fourteenth Amendment . . . . . passim

Fifteenth Amendment ..... .passim

Mont. Const. (1889):

art. V, § 3 ..... .25

art. VII, § 3 25

art. VIII, § 10 ..... .25

art. XIV, § 1 25

art. IX, § 2 (1889) 25

STATUTES

Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621 11

Americans with Disabilities Act of 1990 (ADA):

Title I, 42 U.S.C. § 12112(a) 13

Title II, 42 U.S.C. §§ 12131-12165 13

Family and Maternal Leave Act, 29 U.S.C. §§ 2601-2654 13

Headstart, Economic Opportunity, and Community Partnership Act of 1975, Pub. L. No. 93-644, 88 Stat. 2291, 2323 (1975) ..... .19

Housing and Urban Development Act of 1970, Pub. L. No. 91-609, 84 Stat. 1770, 1806 (1970) 19

Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069 (1978) 19

Indian Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73 (1968) 19

Indian Claims Commission Act Amendment, Pub. L. No. 95-243, 92 Stat. 153 (1978) 19

Indian Education Act, Pub. L. No. 92-318, 86 Stat. 235, 334-45 (1972) 19

Indian Health Care Improvement Act, Pub. L. No. 94-437, 90 Stat. 1400 (1976) 19

Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975) 19

Montana Statutes:

1911 Mont. Laws 12th Sess., § 21 25

1933 Mont. Laws 23rd Sess., Chap. 101 25

1937 Mont. Laws, 25th Sess., Chaps. 147 & 172 . .25

1941 Mont. Laws, Chap. 8 25

1951 Mont. Laws, 32nd Sess., Chap. 203 26

1957 Mont. Laws, 35th Sess., at 768-70 26

1969 Mont. Laws, 41st Sess., at 1166-68 26

1974 Mont. Laws, 43rd 2d Sess., at 1666-67 26

1975 Mont. Laws, 44th Sess., at 1723-24 26

Patent Remedy Act, 35 U.S.C. §§ 271(h) & 296(a) 11

Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb 9

Violence Against Women Act of 1994, 42 U.S.C. § 13981.12

Voting Rights Act:

42 U.S.C. § 1973, Section 2 . . . . . passim

42 U.S.C. § 1973b(e) 5

42 U.S.C. § 1973c, Section 5 ..... 9, 20, 22, 23

42 U.S.C. § 1973j(d) 1

CONGRESSIONAL DOCUMENTS

Cong. Rec. H4711 (daily ed. June 2, 1975) 18

Cong. Rec. H4825 (daily ed. June 3, 1975) 18

Cong. Rec. S13603 (daily ed. July 24, 1975) 19

1 Extension of the Voting Rights Act: Hearings Before the House Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary, 97th Cong., 1st Sess. (1981) 16

2 Extension of the Voting Rights Act: Hearings Before the House Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary, 97th Cong., 1st Sess. (1981) 17

3 Extension of the Voting Rights Act: Hearings Before the House Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary, 97th Cong., 1st Sess. (1981) 17

H.Rep. No. 227 , 97th Cong., 1st Sess (1981) 16

S.Rep. No. 295, 94th Cong., 1st Sess. (1975) 5

S.Rep. No. 417, 97th Cong., 2d Sess. (1982) ..... passim

Voting Rights Act: Hearings Before the Senate Subcomm. on the Constitution of the Comm. of the Judiciary, 97th Cong., 2d Sess. (1982) 15

COURT RULES

S. Ct. Rule 12.6 2

OTHER

VI Charles J. Kappler, Indian Affairs: Laws and Treaties (1975) 19

United States Commission on Civil Rights, Indian Tribes: A Continuing Quest for Survival (1981) 25

BRIEF OF PRIVATE RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Private respondents, Joseph F. McConnell, Franklin R. Perez, Candace D. De Celles, Cheryl Sears, Wesley D. Cochran, Linda M. Buck, Donald L. Long Knife, Daniel Kinsey, and Fort Belknap Community Council, respectfully request that this Court deny the petition for writ of certiorari seeking review of the Ninth Circuit's opinion in this case.

STATEMENT OF FACTS

This action was brought by the United States on November 16, 1999, under Sections 2 and 12(d) of the Voting Rights Act, 42 U.S.C. §§ 1973 and 1973j(d), challenging at-large elections for the Board of Commissioners of Blaine County, Montana. Private respondents are American Indians, who are residents and voters of Blaine County, and the Fort Belknap Community Council. The Community Council is the elected tribal government of the Assiniboine and Gros Ventre Tribes of the Fort Belknap Indian Reservation.

Following trial on the merits the district court held that the challenged at-large system violated Section 2. Private respondents moved to intervene post-judgment, which was granted by the district court "for purposes of the remedy phase of the trial and any appeal with respect to the remedy phase of the trial only." A copy of the minute order granting and limiting intervention is included in the appendix hereto at 1a. After the submission of remedial plans by the parties, the district court adopted the plan submitted by the county providing three single member districts, one of which contained a majority of Indians of voting age, and ordered a special election in the majority Indian district. The defendants appealed and the court of appeals affirmed.[1]

---

[1]Both the opinion of the court of appeals, *United States v. Blaine County, Montana*, 363 F.3d 897 (9th Cir. 2004), and the final judgment of the court of appeals list and acknowledge private respondents as "Plaintiff-Intervenors - Appellees." The court of appeals accepted private respondents' brief opposing the county's motion for a stay pending appeal but, and without stating any reasons therefor, granted the county's motion to strike

The Section 2 Analysis of the Lower Courts

Both the district court and court of appeals applied the analysis set out in *Thornburg v. Gingles*, 478 U.S. 30, 50-1 (1986), in concluding that at-large elections for the Blaine County Commission diluted Indian voting strength in violation of Section 2 of the Voting Rights Act.

First, the district court found and the court of appeals agreed that Indians in Blaine County are "geographically compact" such that they could constitute a majority in one or more single member districts. App. 3, 44, 53. The county does not challenge that finding.

Second, the district court found and the court of appeals agreed that Indians in Blaine County are "politically cohesive." App. 24, 48, 53. According to the court of appeals, "the

---

private respondents' merits brief. Private respondents submit that as intervenors they are properly before this Court. *See* S. Ct. Rule 12.6 ("[a]ll parties to the proceeding in the court whose judgment is sought to be reviewed are deemed parties entitled to file documents in this Court"). Assuming intervention was properly limited to the remedy phase of trial and any appeal therefrom, the county made the propriety of the remedy ordered by the district court an issue on appeal. The notice of appeal provides that Blaine County appeals "from that part of the Order providing that said districts are Single Member Commissioner Districts, and orders a special election in Single Member Commissioner District Number One, rather than at-large." Defendants' Notice of Appeal, July 12, 2002. In its application for a stay pending appeal, the county sought a stay of the order of the district court "which requires that Blaine County conduct a special election for a newly created, single-member Commissioner district." Defendants-Appellants' Urgent Motion Under Circuit Rule 27-3(b), For Stay Pending Appeal, p. 1. And in its brief on appeal, the county argued that the court of appeals "must reverse the ruling of the Trial Court," which necessarily included the remedy of single member districts and a special election. Appellants' Brief, p. 94. Private respondents, pursuant to the order of the district court, were properly before the court of appeals to defend the order of the trial court ordering a remedy consisting of single member districts and a special election, and as such were free, both in the court of appeals and this Court, to make any argument in support of the judgment below. *See Massachusetts Mut. Life Ins. Co. v. Ludwig*, 426 U.S. 479, 481 (1976) (intervenors "may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record"); *Blum v. Bacon*, 457 U.S. 132, 138 n.5 (1982).

evidence "indisputably shows that American Indians consistently bloc vote." App. 23.

Third, the district court found and the court of appeals agreed that whites voted sufficiently as a bloc usually to defeat the candidates preferred by Indian voters. App. 24, 53. The court of appeals concluded that white bloc voting "precludes American Indians from electing candidates of their choice." App. 31.

Turning to the totality of circumstances, the courts below concluded that: (1) there was a history of official discrimination against Indians, including "extensive evidence of official discrimination by federal, state, and local governments against Montana's American Indian population;" (2) there was racially polarized voting which "made it impossible for an American Indian to succeed in an at-large election;" (3) voting procedures, including staggered terms of office and "the County's enormous size [which] makes it extremely difficult for American Indian candidates to campaign county-wide," enhanced the opportunities for discrimination against Indians; (4) depressed socio-economic conditions existed for Indians; (5) there was a tenuous justification for the at-large system, in that at-large elections were not required by state law while "the county government depends largely on residency districts for purposes of road maintenance and appointments to County Boards, Authorities and Commissions;" and (6) "American Indian electoral failure in Blaine County is nearly total." App. 4, 31-33, 54-57.

The courts below, after conducting a "searching practical evaluation" of local electoral conditions in Blaine County, as required by *Gingles*, 478 U.S. at 79, concluded that the challenged at-large system diluted Indian voting strength in violation of Section 2. App. 36, 61-62.

SUMMARY OF THE ARGUMENT

Section 2 of the Voting Rights Act has been held to be constitutional by this Court and has been repeatedly applied, both by this Court and the lower federal courts. There is no conflict between the holding of the court of appeals in this case

and any other circuit court concerning the constitutionality of Section 2.

In the *City of Boerne* line of cases, this Court not only did not cast doubt upon the constitutionality of Section 2, but repeatedly cited the Voting Rights Act as an example of the proper exercise of congressional power to enforce the Fourteenth and Fifteenth Amendments. The court of appeals in this case properly applied *Boerne* and its progeny.

The legislative history of Section 2 strongly supports the constitutionality of the statute. Congress had before it abundant evidence of the discriminatory use and effect of at-large elections. It also considered substantial evidence of discrimination in voting nationwide and against language minorities, including American Indians. In enacting Section 2, Congress could properly prohibit practices that do not themselves violate the Constitution as a means of enforcing the underlying constitutional guarantees.

Racial bias against Indians was shown to exist, but is not a prerequisite to establishing racially polarized voting or a violation of Section 2. Similarly, while Indians in Montana share a common history, including their reservation status, membership in distinctive tribes, a common socio-economic status, *etc.*, evidence that a significant number of Indians usually vote for the same candidates established political cohesion necessary to a Section 2 vote dilution claim.

The concurrent findings by the courts below that at-large elections for the county commission diluted minority voting strength were not "very obvious and exceptional error." Accordingly, the petition for a writ of certiorari should be denied.

REASONS FOR DENYING THE PETITION

I. Section 2 Has Been Held To Be Constitutional and Has Been Repeatedly Applied by This Court

Blaine County's principal argument that Section 2 is, or may be, unconstitutional is without merit. This Court affirmed

the constitutionality of Section 2 of the Voting Rights Act in *Mississippi Republican Executive Committee v. Brooks*, 469 U.S. 1002 (1984), *aff'g Jordan v. Winter*, 604 F.Supp. 807 (N.D.Miss. 1984) (three-judge court). The three-judge district court, relying upon the legislative history and "judicial and scholarly interpretation" of the statute, rejected the defendant's contention that Section 2 "exceeds Congress's enforcement power under the fifteenth amendment." *Jordan v. Winter*, 604 F.Supp. at 810-11. One of the questions presented in the statement of jurisdiction to this Court on appeal was: "Whether Section 2, if construed to prohibit anything other than intentional discrimination on the basis of race in registration and voting, exceeds the power vested in Congress by the Fifteenth Amendment." *Mississippi Republican Executive Committee v. Brooks*, 469 U.S. at 1003 (Stevens, J., concurring).[2] In affirming the district court, this Court necessarily "rejec[ted] the specific challenges presented in the statement of jurisdiction." *Id.* (*quoting Mandel v. Bradley*, 432 U.S. 173, 176 (1977)). *See also Hicks v. Miranda*, 422 U.S. 332, 344 (1975) (summary affirmance is a decision on the merits).

This Court subsequently construed and applied Section 2 in *Thornburg v. Gingles*. It invalidated four multi-member legislative districts in North Carolina on the ground that they impaired "the opportunity of black voters 'to participate in the political process and to elect representatives of their choice.'" 478 U.S. at 34. The Court would not have done so had it doubted the constitutionality of the statute or that the statute reached voting procedures that diluted minority voting strength.

---

[2]The basic provisions of the Voting Rights Act of 1965 were enacted pursuant to Congress's powers under the Fifteenth Amendment, South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966), although Section 4(e) of the act, 42 U.S.C. § 1973b(e), was enacted to enforce the equal protection clause of the Fourteenth Amendment. *See Katzenbach v. Morgan*, 384 U.S. 641, 652 (1966). Subsequent amendments and extensions of the act in 1970, 1975, and 1982, were pursuant to congressional authority to enforce both the Fourteenth and Fifteenth Amendments. *See Oregon v. Mitchell*, 400 U.S. 112, 117-18 (1970); S.Rep. No. 295, 94th Cong., 1st Sess. 35-6 (1975); S.Rep. No. 417, 97th Cong., 2d Sess. 35-6 (1982).

Moreover, the judgment of the Court in *Gingles* that the four districts violated Section 2 was unanimous.[3] Justice O'Connor, for example, in a concurring opinion joined by Chief Justice Burger and Justices Powell and Rehnquist, expressly "agree[d] with the Court that proof of vote dilution can establish a violation of § 2 as amended." 478 U.S. at 87. Again, the Court would not have reached the decision it did, nor concurred unanimously in the judgment that the four legislative districts violated Section 2, if it had doubts about the constitutionality of the statute.

In cases involving Section 2 decided by it subsequent to *Mississippi Republican Executive Committee v. Brooks* and *Gingles*, the Court has never expressed any doubts or reservations about the constitutionality of the statute and has consistently enforced the obligations it places upon the several States. *See, e.g., Chisom v. Roemer*, 501 U.S. 380, 404 (1991) (applying Section 2 to the method of electing appellate court judges); *Houston Lawyers' Ass'n v. Atty. Gen. of Texas*, 501 U.S. 419 (1991) (applying Section 2 to the method of electing state trial court judges); *Growe v. Emison*, 507 U.S. 25, 40 (1993) (applying Section 2 analysis to single member district plans); *Voinovich v. Quilter*, 507 U.S. 146, 154 (1993) (applying Section 2 analysis to claims of "influence" dilution); *Holder v. Hall*, 512 U.S. 874, 885-86, 951 n.3, 962-63 (1994) (rejecting any narrowing interpretation of Section 2); *Johnson v. De Grandy*, 512 U.S. 997 (1994) (applying Section 2 analysis to a state legislative redistricting plan); *Reno v. Bossier Parish School Board*, 520 U.S. 471, 486 (1997) (holding that discriminatory effects of dilution under Section 2 were relevant in determining whether there was a discriminatory purpose under Section 5); *Abrams v. Johnson*, 521 U.S. 74, 90 (1997) (noting that "Section 2 of the Voting Rights Act applies to any 'voting qualification or prerequisite to voting or standard, practice, or procedure . . . imposed or applied by any State or political subdivision'" and applying Section 2 analysis to a court ordered redistricting plan); *Georgia v, Ashcroft*, 539 U.S.

---

[3]The three dissenters, Justices Stevens, Marshall, and Blackmun, contended that a fifth challenged district, House District 23, also violated Section 2. 478 U.S. at 106.

461, 478 (2003) (confirming that "§ 2 applies to all States"); *Charleston County, S.C. v. United States*, 125 S. Ct. 606 (2004), *den'g cert. in* 365 F .3d 341 (4th Cir. 2004) (successful Section 2 challenge to at-large elections in Charleston County, South Carolina).

There is plainly no merit to the county's contention that the constitutionality of Section 2 "remains an open question." Pet. at 6.[4]

II. There Is No Conflict with the Second Circuit

Despite the county's claim, Pet. at 5, there is no conflict between the holding of the court in this case concerning the constitutionality of Section 2 and that of the Second Circuit in *Muntaqin v. Coombe*, 366 F.3d 102 (2d Cir. 2004). To the contrary, the panel in *Muntaqin* "note[d] at the outset that we do not in any way cast doubt on Congress's authority to enact the Voting Rights Act," that "the court of appeals that have squarely addressed the issue have concluded that § 1973, on its face, meets the requirements for 'appropriate legislation' under the Fourteenth and Fifteenth Amendments," and that "[w]e do not doubt this conclusion." *Id.* at 121. That court, citing *Richardson v. Ramirez*, 418 U.S. 24, 43 (1974), declined to apply Section 2 to state law disfranchising currently incarcerated felons and parolees because the practice was sanctioned by the Fourteenth Amendment. *Muntaqin*, 366 F.3d at 122. No sanction exists for a county to dilute minority voting strength through use of at-large elections. Moreover, the panel opinion in *Muntaqin* has been vacated and the case set for rehearing *en banc*. 2004 WL 2998551 (2nd Cir. (N.Y.)).

The lower federal courts, in addition to the panel in *Muntaqin*, have unanimously affirmed the constitutionality of

---

[4]As noted *infra*, the Court has consistently rejected challenges to other provisions of the Voting Rights Act. See *South Carolina v. Katzenbach*, 383 U.S. at 309; *Katzenbach v. Morgan*, 384 U.S. at 651; *Gaston County v. United States*, 395 U.S. 285, 287 (1969); *Oregon v,. Mitchell*, 400 U.S. at 118; *City of Rome v. United States*, 446 U.S. 156, 173 (1980).

Section 2. *See, e.g., Mixon v. Ohio*, 193 F.3d 389, 398 (6th Cir. 1999) ("Congress had the authority to regulate state and local voting though the provisions of the Voting Rights Act"); *United States v. Marengo County Commission*, 731 F.2d 1546, 1563 (11th Cir. 1984) ("[u]nder the test of *M'Culloch*, section 2 is 'consis[tent] with the letter and spirit of the constitution' . . . and is clearly constitutional"); *Jones v. City of Lubbock*, 727 F.2d 364, 373 (5th Cir. 1984) ("Congressional power to adopt prophylactic measures to vindicate the purposes of the fourteenth and fifteenth amendments is unquestioned"); *LULAC v. Clements*, 986 F.2d 728 (5th Cir. 1993) ("concerns of federalism must not be allowed to emasculate Congress' power to adopt prophylactic measures to vindicate the purposes of those Amendments"); *Sanchez v. Colorado*, 97 F.3d 1303, 1314 (10th Cir. 1996) (noting "the constitutionality of § 2"); *United States v. Blaine County, Montana*, 363 F.3d 897, 907 (9th Cir. 2004) ("Congress did not exceed its Fourteenth and Fifteenth Amendment enforcement powers by applying section 2 nationwide").

Given the decisions of the Court interpreting and applying Section 2, Justice O'Connor has concluded that "it would be irresponsible for a State to disregard the §2 results test." *Bush v. Vera*, 517 U.S. 952, 991 (1996) (O'Connor, J., concurring).[5] In light of its consistent application by the federal courts, there is no conflict among the circuits concerning the constitutionality of Section 2.

III. The Decision of the Ninth Circuit Is Not in Conflict with *Boerne* Through *Lane*

The county is wrong in claiming that recent decisions of this Court cast doubt upon the constitutionality of Section 2.[6]

---

[5]Justice O'Connor further noted that while the Court had never granted plenary review of the constitutionality of the statute, "[i]n the 14 years since the enactment of § 2(b), we have interpreted and enforced the obligation that it places on States in a succession of cases." 517 U.S. at 990.

[6]The decisions relied upon by defendants are: City of Boerne v. Flores, 521 U.S. 507 (1997); Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank, 527 U.S. 627 (1999); Kimel v.

None of the decisions cited by the county involved voting rights or discrimination based upon race. Indeed, to the extent that the cases discuss voting rights legislation at all, they cite them as examples of the proper exercise of congressional power to enforce the Fourteenth and Fifteenth Amendments.

In *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997), the Court invalidated the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb *et seq.*, because of an absence of "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." However, the Court repeatedly cited the Voting Rights Act as an example of congressional legislation that *was* constitutional. *See, e.g.*, 521 U.S. at 518 (citing the Voting Rights Act's suspension of literacy tests as an appropriate measure enacted under the Fifteenth Amendment "to combat racial discrimination in voting"); *id.* at 518 (the seven year extension of Section 5 of the Voting Rights Act and the nationwide ban on literacy tests were "within Congress' power to enforce the Fourteenth and Fifteenth Amendments, despite the burdens those measures placed on the States"); *id.* at 532 (citing Section 5 of the Voting Rights Act as an "appropriate" measure "'adapted to the mischief and wrong which the [Fourteenth] [A]mendment was intended to provide against'" (*quoting Civil Rights Cases*, 109 U.S. 3, 13 (1883)). The Court described the various remedies imposed by the Voting Rights Act as "unprecedented," but deemed them "necessary given the ineffectiveness of the existing voting rights laws." 521 U.S. at 526. The county's argument that *City of Boerne* casts doubt upon the constitutionality of Section 2, or any other provision of the Voting Rights Act, cannot be seriously credited.

The Court in *City of Boerne* also contrasted the extensive record of discrimination compiled by Congress when it passed the Voting Rights Act with what it characterized as the scant record of discrimination supporting passage of RFRA.

Florida Board of Regents, 528 U.S. 62 (2000); United States v. Morrison, 529 U.S. 598 (2000); Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356 (2001); Nevada Department of Human Resources v. Hibbs, 538 U.S. 721 (2003); and Tennessee v. Lane, 124 S. Ct. 1978 (2004).

The evidence of discrimination in voting was "subsisting and pervasive." 521 U.S. at 525. The deprivation of constitutionally protected voting rights was "widespread and persisting." *Id.* at 526. Congress had before it "a long history" of disfranchisement of voters on account of their race. *Id.* at 526 (*quoting Oregon v. Mitchell*, 400 U.S. 112, 147 (1970) (opinion of Black, J.)). Congress acted in light of the "evil" of "racial discrimination [in voting] which in varying degrees manifests itself in every part of the country." *Id.* at 526 (*quoting Oregon v. Mitchell*, 400 U.S. at 284 (opinion of Stewart, J.). The legislative record disclosed "95 years of pervasive voting discrimination," *id.* at 526 (*quoting City of Rome v. United States*, 446 U.S. 156, 182 (1980)), and "modern instances of generally applicable laws passed because of [racial] bigotry." *Id.* at 530. By contrast the legislative history of RFRA, in the view of the Court, contained no such evidence, leading it to conclude that "RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *Id.* at 532. Again, any suggestion that *City of Boerne* casts doubt upon the constitutionality of Section 2, or any other provision of the Voting Rights Act, which the Court has repeatedly held was proportional to a remedial objective, must be discounted.

The burden of proof under Section 2 and RFRA are also totally different. Under RFRA, once a plaintiff showed a substantial burden on free exercise of religion, the state was required to demonstrate a compelling governmental interest and show that the law was the least restricting means of furthering that interest. *City of Boerne*, 521 U.S. at 533-34. Given the relative ease of establishing a substantial burden on free exercise, the Court concluded that the test under RFRA "'would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind.'" *Id.* at 534 (*quoting Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 888 (1990)). Under Section 2, by contrast, no voting practice is presumed to be in violation of the statute and there is no burden shifting. A plaintiff has the burden throughout of showing that a challenged voting practice, such as at-large elections, violates the statute. Any analogy between RFRA and Section 2 is inapt.

Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank, 527 U.S. 627 (1999), also cited by defendants, is another case which neither involved voting rights nor racial discrimination. The Court invalidated the Patent Remedy Act, 35 U.S.C. §§ 271(h) & 296(a), allowing suits against a state because "Congress identified no pattern of patent infringement by the States, let alone a pattern of unconstitutional violations." *Florida Prepaid*, 527 U.S. at 640. But as in *City of Boerne*, the Court in *Florida Prepaid* expressly and repeatedly noted the constitutionality "of Congress' various voting rights measures" passed pursuant to the Fourteenth and Fifteenth Amendments, which it described as tailored to "remedying or preventing" discrimination based upon race. 527 U.S. at 639 and n.5.

Lest there be any doubt about the constitutionality of the Voting Rights Act, the Court in *Florida Prepaid* stressed that "[u]nlike the undisputed record of racial discrimination confronting Congress in the voting cases, . . . Congress came up with little evidence of [patent] infringing conduct on the part of the States." 527 U.S. at 640 (citation omitted). And to underscore the point, the Court repeated that "[t]he legislative record thus suggests that the Patent Remedy Act does not respond to a history of 'widespread and persisting deprivation of constitutional rights' of the sort Congress has faced in enacting proper prophylactic § 5 legislation." *Id.* at 645 (*quoting City of Boerne*, 521 U.S. at 526, and its references to congressional voting rights enactments). As is apparent, nothing in *Florida Prepaid* remotely suggests that Section 2 of the Voting Rights Act is unconstitutional.

Kimel v. Florida Board of Regents, 528 U.S. 62 (2000), also relied upon by defendants, invalidated the provision of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621 *et seq.*, which subjected states to suit for money damages for age discrimination. But nothing in the opinion suggests that Section 2 of the Voting Rights Act is unconstitutional. First, the Court held that classifications based upon age were unlike those based upon race, and that "age is not a suspect classification under the Equal Protection Clause." 528 U.S. at 83. Second, the Court held that states may discriminate on the basis of age if the classification "is

rationally related to a legitimate state interest." *Id.* Classifications based on race, however, are constitutional only if they are narrowly tailored to further a compelling governmental interest. *Id.* at 84. Age classifications, unlike racial classifications, are "presumptively rational." *Id.* Against this backdrop, the Court concluded that ADEA was not "responsive to, or designed to prevent, unconstitutional behavior." *Id.* at 86 (*quoting City of Boerne*, 521 U.S. at 532). Precisely the opposite is true of Section 2 of the Voting Rights Act. *See South Carolina v. Katzenbach*, 383 U.S. at 309.

In addition, according to the Court in the legislative history of ADEA "Congress never identified any pattern of age discrimination by the States, much less any discrimination whatsoever that rose to the level of constitutional violation." *Kimel*, 528 U.S. at 89. Again, the opposite can be said of the Voting Rights Act, and *Kimel* is no authority for the county's claim that the Section 2 violates the Constitution.

In *United States v. Morrison*, 529 U.S. 598 (2000), another decision relied upon by the county, the Court invalidated a section of the Violence Against Women Act of 1994, 42 U.S.C. § 13981, which provided civil penalties against private individuals who had committed criminal acts motivated by gender bias. The Court concluded that the disputed provision could not be upheld as a proper exercise of congressional power under § 5 of the Fourteenth Amendment because "it is directed not at any State or state actor, but at individuals." 529 U.S. at 626. Section 2 of the Voting Rights Act, by contrast, is by its express terms directed at states and state actors, *i.e.*, at "any State or political subdivision." It contains no provision for civil penalties or a cause of action against individual voters. Moreover, the Court cited as examples of the proper exercise of congressional power under the Fourteenth and Fifteenth Amendments the various voting rights laws found to be constitutional in *Katzenbach v. Morgan* and *South Carolina v. Katzenbach*. *Id.* Yet again, nothing in *United States v. Morrison* casts any doubt upon the constitutionality of Section 2 of the Voting Rights Act.

In *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), also relied upon by the county,

the Court invalidated a portion of Title I of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12112(a), allowing state employees to recover money damages by reason of the state's failure to comply with the statute. The Court concluded that there was no evidence of a "pattern of unconstitutional discrimination on which § 5 [of the Fourteenth Amendment] legislation must be based." 531 U.S. at 370. However, the Court was careful to underscore the constitutionality of the Voting Rights Act and singled it out as a preeminent example of appropriate legislation enacted to enforce the race discrimination provisions of the Civil War Amendments in the area of voting. *Id.* at 373.

In *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721, 736 (2003), another decision cited by the county, the Court affirmed the constitutionality of the family leave provisions of the Family and Maternal Leave Act, 29 U.S.C. §§ 2601-2654, noting that "state gender discrimination . . . triggers a heightened level of scrutiny." In doing so, it cited with approval the decisions in *Katzenbach v. Morgan*, *Oregon v. Mitchell*, and *South Carolina v. Katzenbach* , which rejected challenges to provisions of the Voting Rights Act as "as valid exercises of Congress' § 5 power [under the Fourteenth Amendment]." *Hibbs*, 538 U.S. at 738. Once again, nothing in *Hibbs* supports the argument that Section 2 is unconstitutional.

Finally, in *Tennessee v. Lane*, 124 S. Ct. 1978, 1994 (2004), the Court held that Title II of the Americans With Disabilities Act, 42 U.S.C. §§ 12131-12165, as applied to the fundamental right of access to the courts, "constitutes a valid exercise of Congress' § 5 authority to enforce the guarantees of the Fourteenth Amendment." Yet again, nothing in *Lane* remotely suggests that Section 2 of the Voting Rights Act is unconstitutional.

None of the decisions of the Court cited by the county casts doubt on the constitutionality of Section 2. To the extent that they discuss legislation enacted by Congress pursuant to the enforcement provisions of the Fourteenth and Fifteenth Amendments to redress the problem of racial discrimination in voting, they do so to affirm its constitutionality. The *Boerne*

line of cases thus removes, rather than raises, any questions about the constitutionality of Section 2.

A. The Court of Appeals Properly Applied the *Boerne* Line of Cases

There is no merit to the county's contention that the court of appeals "created its own tests that conflict with this Court's decisions in *Boerne* through *Lane*." Pet. at 12. To the contrary, the court of appeals followed *Boerne, et al.,* and held that "this line of authority strengthens the case for section 2's constitutionality." App. 12. It noted that "in the Supreme Court's congruence-and-proportionality opinions, the VRA stands out as the prime example of a congruent and proportionate response to well documented violations of the Fourteenth and Fifteenth Amendments," that when *Boerne* "first announced the congruence-and-proportionality doctrine . . . it twice pointed to the VRA as the model for appropriate prophylactic legislation," and, citing *Hibbs*, *Garrett*, *Morrison*, and *Florida Prepaid*, that "the Court's subsequent congruence-and-proportionality cases have continued to rely on the Voting Rights Act as the baseline for congruent and proportionate legislation." App. 12. The court of appeals did not ignore the *Boerne* line of cases; it expressly followed and applied them.

IV. The Legislative History Strongly Supports the Constitutionality of Section 2

In arguing that Section 2 may not be constitutionally applied nationwide, the county claims that the court of appeals did not "properly" examine the legislative history of Section 2, and that had it done so "it would have found that there was no evidence of a widespread pattern of purposeful voting discrimination outside jurisdictions subject to Section 5 of the VRA." Pet. at 16. While the county's argument is foreclosed by *Brooks* and the *Boerne* line of cases, which upheld the constitutionality of Section 2,[7] it should be noted that the

---

[7] *Boerne*, for example, held that legislation enacted under § 5 of the Fourteenth Amendment, such as Section 2 of the Voting Rights Act, does not require "geographic restrictions." 521 U.S. at 533.

county's argument reflects a complete ignorance of the legislative history of the 1982 statute, as well as its predecessors.

When it enacted the Voting Rights Act in 1965, Congress documented a pervasive, chronic history of "unremitting and ingenious defiance of the Constitution" by many states in denying racial minorities the equal right to vote. *South Carolina v. Katzenbach*, 383 U.S. at 309. Although the Court expressed the hope that "millions of non-white Americans will now be able to participate for the first time on an equal basis in the government under which they live," *id.* at 337, the act in fact set off a new wave of purposeful discrimination against racial minorities. According to the 1982 Senate report:

> Following the dramatic rise in registration [after passage of the 1965 act], a broad array of dilution schemes were employed to cancel the impact of the new black vote. Elective posts were made appointive; election boundaries were gerrymandered; majority runoffs were instituted to prevent victories under a prior plurality system; at-large elections were substituted for election by single-member districts, or combined with other sophisticated rules to prevent an effective minority vote. The ingenuity of such schemes seems endless. Their common purpose and effect had been to offset the gains at the ballot box under the Act.

S.Rep. No. 417, 97th Cong., 2d Sess. 6 (1982).[8]

---

[8]The testimony and evidence before the Senate, particularly as it related to the discriminatory effect of at-large elections, was extensive and nationwide. *See, e.g., Voting Rights Act: Hearings Before the Senate Subcomm. on the Constitution of the Comm. of the Judiciary*, 97th Cong., 2d Sess. 208-09 (1982) (statement of U.S. Sen. Charles Mathias, Jr., of Maryland, observing that at-large elections "have been effectively deployed to dilute the impact of minority voters"); *id.* at 458 (testimony of Hon. Henry L. Marsh, Mayor of the City of Richmond, Virginia, describing the discriminatory effect of at-large elections in Virginia); *id.* at 802 (testimony

The House report noted similar instances of discrimination and widespread opposition to equal voting rights that followed passage of the 1965 act.

> Since the passage of the Act in 1965, reports presented by the U.S. Commission on Civil Rights, studies conducted by social and political scientists, and Congressional hearings have all identified discriminatory elements of the election process such as at-large elections, high fees and bonding requirements, shifts from elective to appointive office, majority vote run-off requirements, numbered posts, staggered terms, full slate voting requirements, residency requirements, annexations, retrocessions, incorporations, and malapportionment and racial gerry[mandering].

H.Rep. No. 227, 97th Cong., 1st Sess. 18 (1981).[9]

---

of Armand Derfner, Esq. of the Joint Center for Political Studies, colloquy with Senator Hatch regarding at-large elections); *id.* at 960 (testimony of Prof. Norman Dorsen of the NYU School of Law, colloquy with Senator Hatch regarding at-large elections); *id.* at 993-995 (testimony of Rolando Rios, Legal Director of the Southwest Voter Registration Education Project, describing the discriminatory effect of at-large elections on Chicano voters); *id.* at 1189, 1201-04, 1209-10 (testimony of Frank R. Parker, Director of the Voting Rights Project at the Lawyers' Committee for Civil Rights Under Law, discussing at-large elections); *id.* at 1286 (testimony of Steve Suitts, Executive Director, Southern Regional Council, describing the discriminatory history of at-large elections in North Carolina); *id.* at 1430 (testimony of Archibald Cox, Chairman, Common Cause, discussing the effect of the proposed amendment on at-large elections); *id.* at 1674 (statement of U.S. Sen. Patrick Leahy of Vermont, discussing at-large elections).

[9]The testimony and evidence before the House concerning the discriminatory effect of at-large elections was also extensive. *See, e.g.*, 1 *Extension of the Voting Rights Act: Hearings Before the House Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary*, 97th Cong., 1st Sess. 38-41 (1981) (testimony of Rolando L. Rios, Legal Director, Southwest Voter Registration Education Project, describing at-large elections as "the single most harmful device used against minorities); *id.* at 226-27 (testimony of State Sen. Julian Bond of Georgia, describing the discriminatory use of at-large elections in Georgia); *id.* at 401-02 (testimony

Congress also had before it, and considered, a number of court decisions documenting voting discrimination against Native Americans when it enacted the minority language provisions of the Voting Rights Act in 1975, which expressly extended coverage to Indians, and when it amended Section 2 in 1982. Those decisions included: *Klahr v. Williams*, 339 F. Supp. 922, 927 (D.Ariz. 1972) (finding that legislative redistricting in Arizona had been adopted for the purpose of diluting Indian voting strength), cited in *Extension of the Voting Rights Act: Hearings Before the Subcomm. on Civil and*

---

of Rev. Curtis W. Harris, President of the Southern Christian Leadership Conference for the State of Virginia, describing the discriminatory effect of at-large elections in Hopewell, Virginia); *id.* at 452-53 (testimony of Prof. Richard Engstrom of the University of New Orleans, discussing the impact of at-large elections on minority voting strength); *id.* at 511-16, testimony of Frank R. Parker, Director of the Voting Rights Project at the Lawyers' Committee for Civil Rights Under Law, discussing the discriminatory impact of at-large voting in Mississippi); *id.* at 610-23 (testimony of Laughlin McDonald, Director, Southern Regional Office, American Civil Liberties Union Foundation, Inc., discussing the discriminatory effect of at-large elections generally); *id.* at 790-99 (testimony of Abigail Turner, Esq., describing the discriminatory effect of at-large elections in Alabama); 2 *Extension of the Voting Rights Act: Hearings Before the House Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary*, 97th Cong., 1st Sess. 942-49 (1981) (testimony of Joaquin G. Avila, Associate Counsel, Mexican American Legal Defense and Educational Fund, describing the discriminatory effect of at-large elections in Texas); *id.* at 1767-68 (testimony of Arthur S. Fleming, Chairman, U.S. Comm'n on Civil Rights, describing the discriminatory effect of at-large elections); *id.* at 1797 (testimony of Raymond Brown, Southern Regional Council, describing the discriminatory effect of at-large elections); 3 *Extension of the Voting Rights Act: Hearings Before the House Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary*, 97th Cong., 1st Sess. 1901 (1981) (testimony of David Dunbar, General Counsel, National Congress of American Indians, discussing the discriminatory effect of at-large elections on American Indians); *id.* at 2007-08 (testimony of Professor C. Vann Woodward of Yale University, observing that at-large elections were "clearly motivated by racial purposes"); *id.* at 2038 (testimony of James U. Blacksher, Esq., describing at-large elections as "the principal barrier" to equal political participation for minority voters); *id.* at 2749-68 (testimony of Prof. Peyton McCrary of the University of South Alabama, detailing the discriminatory history of at-large elections in Mobile, Alabama). The House report also noted counties in New Mexico and Nebraska which were successfully sued "for attempting to dilute the Indian vote by instituting at-large election voting schemes." H.Rep. No. 227 at 19.

Constitutional Rights of the House Judiciary Comm., 94th Cong., 1st Sess., Appendix 1225-30 (1975) (hereinafter "*1975 House Hearings*"); *Oregon v. Mitchell*, 400 U.S. at 147 (literacy "tests have been used at times as a discriminatory weapon against . . . American Indians") (Douglas, J., concurring), cited in Cong. Rec. H4716 (daily ed. June 2, 1975) (statement of Rep. Edwards); *Goodluck v. Apache County*, 417 F.Supp. 13 (D.Ariz. 1975) (finding that a county redistricting plan had been adopted to diminish Indian voting strength), cited in *1975 House Hearings*, Appendix 1225-30, and in Cong. Rec. H4709 (daily ed. June 2, 1975) (statement of Rep. Young); *United States v. Humboldt County, Nev.*, Civ. No. R 70-0144 HEC (D.Nev. 1979) (finding that registrars discriminated against Indians in voter registration), cited in H.Rep. No. 227 at 16; *United States v. Board of Supervisors of Thurston County, Neb.*, Civ. No. 79-0-380 (D.Neb. 1979) (at-large elections diluted Indian voting strength), cited in H.Rep. No. 227 at 19; *United States v. San Juan County*, Civ. No. 79-507 (D.N.M. 1979) (at-large elections diluted Indian voting strength), cited in H.Rep. No. 227 at 19; and, *United States v. Bartleme, Wi.* , Civ. No. 78-C-101 (E.D.Wis. 1978) (finding purposeful discrimination against Indians in voting), cited in H.Rep. No. 227 at 19.[10]

---

[10]During the 1975 hearings and debates, members of Congress noted the need to expand the coverage of the Voting Rights Act to Indians. Rep. Peter Rodino, chair of the House Judiciary Committee, said that during subcommittee hearings members of language minority groups, including American Indians, related "instances of discriminatory plans, discriminatory annexations, and acts of physical and economic intimidation." Cong. Rec. H4711 (daily ed. June 2, 1975) (statement by Rep. Rodino). According to Rodino, "[t]he entire situation of these uncovered jurisdictions is tragically reminiscent of the earlier and, in some respects, current problems experienced by blacks in currently covered areas." *Id.* Rep. Robert Drinan noted similarly during the floor debate that there was "evidence that American Indians do suffer from extensive infringement of their voting rights," and that the Department of Justice "has been involved in 33 cases involving discrimination against Indians since 1970." Cong. Rec. H4825 (daily ed. June 3, 1975) (statement of Rep. Drinan). During debate in the senate, Senator William Scott read into the record a document entitled "Prejudice and Discrimination in American History" prepared by the Library of Congress, to the effect that: "Discrimination of the most basic kind has been directed against the American Indian from the day that settlers from Europe set foot upon American shores. . . . [A]s late as 1948 certain Indians

Congress, moreover, does not act in a vacuum. It proceeded against a full backdrop of information and expertise acquired through a host of other legislative acts. In the years before the 1982 amendments to the Voting Rights Act, Congress conducted dozens of oversight hearings on Indian affairs and enacted several major new laws protecting Native Americans. *See, e.g.*, Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069 (1978); Indian Claims Commission Act Amendment, Pub. L. No. 95-243, 92 Stat. 153 (1978); Indian Health Care Improvement Act, Pub. L. No. 94-437, 90 Stat. 1400 (1976); Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975); Indian Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73 (1968), *reprinted in* VI Charles J. Kappler, *Indian Affairs: Laws and Treaties* 1124 (1975); Indian Education Act, Pub. L. No. 92-318, 86 Stat. 235, 334-45 (1972).

Congress also enacted legislation to redress the myriad problems facing the Indian community in housing, health care, and economics. *E.g.*, The Housing and Urban Development Act of 1970, Pub. L. No. 91-609, 84 Stat. 1770, 1806 (1970); The Headstart, Economic Opportunity, and Community Partnership Act of 1975, Pub. L. No. 93-644, 88 Stat. 2291, 2323 (1975); Indian Health Care Improvement Act of 1976, Pub. L. No. 94-437, 90 Stat. 1400 (1976). In 1977, the American Indian Policy Review Commission reported that "[n]o matter where Indians live, the pattern is essentially the same. Incomes are lower than that of the population at large, with more Indians below the poverty level." United States, American Indian Policy Review Commission, *Final Report* 91 (1977). Congress was entitled to draw upon this and other experience in concluding that Native Americans everywhere ought to be included within the protections of the Voting Rights Act. *See Fullilove v. Klutznick*, 448 U.S. 448, 502-03 (1980) (observing that Congress may properly consider "information and expertise that Congress acquires in the consideration and enactment of earlier legislation") (Powell, J.,

---

were still refused the right to vote. The resulting distress of Indians is as severe as that of any group discriminated against in American society." Cong. Rec. S13603 (daily ed. July 24, 1975) (statement of Sen. Scott).

concurring).

Federal courts have uniformly entertained Section 2 claims brought by American Indians, whether or not the jurisdiction in question was covered by Section 5. *See, e.g., Old Person v. Cooney*, 230 F.3d 113 (9th Cir. 2000) (applying Section 2 to a challenge to legislative redistricting brought by tribal members in Montana); *Windy Boy v. County of Big Horn*, 647 F.Supp. 1002 (D.Wyo. 1986) (invalidating at-large elections in Big Horn County, Wyoming, as diluting Indian voting strength); *Cuthair v. Montezuma-Cortez, Colorado School District No. RE-1*, 7 F.Supp. 2d 1152, 1165 (D.Col. 1998) (concluding that "Plaintiffs here [of the Ute Mountain Ute Tribe] are members of a class of citizens protected by § 1973(a)"); *Buckanaga v. Sisseton Independent School District No. 54-5*, 804 F.2d 469, 471 (8th Cir. 1986) (applying Section 2 to a vote dilution claim brought by Sioux Indians in South Dakota); *Stabler v. County of Thurston, Neb.*, 129 F.3d 1015, 1020 (8th Cir. 1997) (applying Section 2 to voting claims brought by tribal members and residents of the Omaha and Winnebago Indian Reservations in Nebraska); *Emery v. Hunt*, 272 F.3d 1042, 1047 (8th Cir. 2001) (Section 2 vote dilution case brought by Sioux Indians in South Dakota); *Bone Shirt v. Hazeltine*, 336 F. Supp. 2d 976 (D.S.D. 2004) (Section 2 challenge brought by tribal members to state legislative redistricting). There is no credible basis for arguing that Section 2 is unconstitutional as applied to Blaine County or any other jurisdiction not covered by Section 5.

The fact that Congress did not make particularized findings with respect to every single jurisdiction covered by Section 2 is immaterial. This Court has recognized that Congress can exercise its enforcement powers under the Fourteenth and Fifteenth Amendments to reach even those jurisdictions with no proven history of discrimination. In *Oregon v. Mitchell*, for example, the Court upheld the nationwide ban on literacy tests even though there were no findings of nationwide discrimination, let alone that literacy tests had been used to discriminate in every jurisdiction of the country. *See* S.Rep. No. 417 at 43. The Court has recognized that in the interests of uniformity in the application of the law, Congress "may paint with a much broader brush" than the

Court itself, which is confined to cases and controversies based upon particular factual records. *Oregon v. Mitchell*, 400 U.S. at 284.

A remedy such as Section 2 reflects an awareness that the problem of discrimination in voting manifests itself in varying degrees in every part of the country, and "that the problem is a national one and reflects a national commitment to its solution." *Oregon v. Mitchell*, 400 U.S. at 284 (Stewart, J., concurring in part). *See also id.* at 216 (in upholding the nationwide ban on literacy tests "Congress could have determined that racial prejudice is prevalent throughout the Nation") (Harlan, J., concurring); *City of Boerne*, 521 U.S. at 526 (racial discrimination in voting "in varying degrees manifests itself in every part of the country") (*quoting Oregon v. Mitchell*).

The nationwide application of Section 2 also recognizes that minority residents of areas where discrimination has been pervasive may migrate to other areas of the country. The disadvantages they have suffered in education, employment, income, *etc.* may continue to hinder their ability to participate in the political process despite the absence of discrimination in their new locations. The power of Congress "to remedy the evils resulting from state-sponsored racial discrimination does not end when the subject of that discrimination removes himself from the jurisdiction in which the injury occurred." *Oregon v. Mitchell*, 400 U.S. at 233 (opinion of Brennan, White, and Marshall, JJ.)

In view of the legislative history, Section 2 was an appropriate exercise of congressional power. Defendants' argument that there is no evidence to support the nationwide application of Section 2 is unconvincing and unavailing.

A. Congress May Dispense with Proof of a Discriminatory Purpose

Despite the county's claim that "Congress may not prohibit facially neutral conduct," Pet. at 20, it was plainly within the power of Congress to enact a law invalidating voting practices that result in discrimination without regard for the

reasons they were enacted or are being maintained. While Congress has no power to amend the Constitution, it does have power to enact statutes that prohibit practices that do not themselves violate the Constitution as a means of enforcing the underlying constitutional guarantees.

In *South Carolina v. Katzenbach*, various Southern states challenged the constitutionality of several provisions of the Voting Rights Act of 1965: Section 5, the suspension of literacy tests in the covered jurisdictions, and the use of federal examiners to register voters. The Court held that all the challenged practices were constitutional, despite the fact that Section 5 prohibited the use of new voting practices or procedures that had only a discriminatory effect, and despite the fact that the Court had earlier held that literacy tests were not *per se* violations of the Fourteenth and Fifteenth Amendments. *See Lassiter v. Northampton County School Board of Elections*, 360 U.S. 45, 52 (1959). The Court concluded that the challenged provisions were appropriate measures enacted by Congress pursuant to Section 2 of the Fifteenth Amendment. *South Carolina v. Katzenbach*, 383 U.S. at 309.

In *Katzenbach v. Morgan*, the Court rejected a challenge by the State of New York to the constitutionality of Section 4(e) of the Voting Rights Act of 1965, which prohibited the use of literacy tests to persons educated in Puerto Rico. New York argued that § 4(e) could not be sustained as appropriate legislation to enforce the Fourteenth Amendment "unless the judiciary decided—even with the guidance of a congressional judgment—[that the literacy test] . . . is forbidden by the Equal Protection Clause itself." 384 U.S. at 648. The Court disagreed. It held that requiring proof of a constitutional violation as a condition for enforcing § 4(e)

> would deprecate both congressional resourcefulness and congressional responsibility for implementing the Amendment. It would confine the legislative power in this context to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional.

384 U.S. at 648-49. Legislation enacted to enforce the Fourteenth Amendment was constitutional, according to the Court, if it could find that it "is plainly adapted to [the] end" of enforcing the equal protection clause and "is not prohibited by but is consistent with 'the letter and spirit of the Constitution,'" regardless whether the practices outlawed by Congress themselves violated the equal protection clause. *Id.* at 651 (*quoting McCulloch v. Maryland,* 17 U.S. 316, 421 (1819)).

The Court rejected a similar contention by Gaston County, North Carolina, which argued that the 1965 Voting Rights Act's ban on literacy tests should not be applied because the county had not used any such test during the preceding five years to discriminate against anyone on account of race or color. *Gaston County v. United States*, 395 U.S. 285, 287 (1969). The Court accepted the county's representations as true, but, pointing to the history of discrimination in education in the county, concluded that "'[i]mpartial' administration of the literacy test today would serve only to perpetuate these inequities [in education] in a different form." 395 U.S. at 297.

Similarly, in *Oregon v. Mitchell*, 400 U.S. at 118, 216, the Court unanimously rejected a challenge by Arizona to the 1970 amendment of the Voting Rights Act which made the ban on literacy tests nationwide. In a concurring opinion, Justice Harlan explained that:

> Despite the lack of evidence of specific instances of discriminatory application or effect, Congress could have determined that racial prejudice is prevalent throughout the Nation, and that literacy tests unduly lend themselves to discriminatory application, either conscious or unconscious. This danger of violation of § 1 of the Fifteenth Amendment was sufficient to authorize the exercise of congressional power under § 2.

400 U.S. at 216.

In *City of Rome v. United States*, the Court rejected a challenge to the constitutionality of Section 5, as extended by

Congress in 1975. It held that "Congress may, under the authority of §2 of the Fifteenth Amendment, prohibit state action that, though in itself not violative of §1, perpetuates the effects of past discrimination," or "create[s] the risk of purposeful discrimination." 446 U.S. at 176-77. *City of Boerne*, moreover, recognized that Congress, pursuant to its power to enforce the Fourteenth Amendment, may pass a law which "prohibits conduct which is not itself unconstitutional." 521 U.S. at 518.

After conducting extensive hearings in 1981 and 1982, Congress concluded:

> (1) that the difficulties faced by plaintiffs forced to prove discriminatory intent through case-by-case adjudication create a substantial risk that intentional discrimination barred by the Fourteenth and Fifteenth Amendments will go undetected, uncorrected and undeterred unless the results test proposed for section 2 is adopted; and (2) that voting practices and procedures that have discriminatory results perpetuate the effects of past discrimination.

S.Rep. No. 417 at 40. Congress plainly has the power to prohibit the use of voting practices that result in discrimination, whether or not such practices would violate the discriminatory purpose standards of the Fourteenth or Fifteenth Amendments. There is no merit to Blaine County's contention that Section 2 is unconstitutional because it does not require a showing of official intentional discrimination or private racial bias.

V. Racial Bias Was Shown to Exist But Is not a Prerequisite for a Finding of Vote Dilution

The county argues that Section 2 requires proof of "invidious racial bias in the community" which "interacts with," or causes, at-large voting to dilute minority voting strength. Pet. at 25. Clearly, and as found by the lower courts, the record in this case contains abundant evidence of racial bias in the community towards Indians. Although it would take volumes to catalogue the extent, discrimination against Indians

has been at least as pervasive and insidious as that practiced against blacks in the South. That history is discussed in many places, including in United States Commission on Civil Rights, *Indian Tribes: A Continuing Quest for Survival* (1981).

More specifically, in Montana, as in other western states, Indian land was confiscated and tribal members were confined on reservations. *See, e.g., Blackfeet and Fort Belknap Reservations in the State of Montana v. United States*, 81 Ct. Cl. 101 (1935). In finding that there was a history of discrimination against Indians in Montana and Blaine County, the district court took special note of the findings of the trial court in *Old Person v. Cooney*, No. CV-96-004-GF (D.Mont. Oct. 27, 1998), which were affirmed by the court of appeals in *Old Person*, 230 F.3d at 1129. App. 55. The trial court in *Old Person* found that during territorial days the Montana legislature: excluded Indians from voting; made it a crime to establish a voting precinct on any Indian Reservation, agency, or trading post; and denied Indians the right to serve on grand and trial juries. Slip op. at 40. When it became a state, Montana continued to deny Indians the right to vote, Mont. Const. art. IX, § 2 (1889), 1911 Mont. Laws 12th Sess., § 21 at 223, 238-40, and denied them the right to hold certain public offices. Mont. Const. art. V, § 3, art. VII, § 3, art. VIII, § 10, art. XIV, § 1 (1889). Between 1903 and 1921, the legislature adopted a number of resolutions seeking to open the Fort Belknap and other Indian Reservations in the state to settlement by whites. *Old Person v. Cooney*, slip op. at 41. Between 1903 and 1951, the legislature passed laws prohibiting Indians from carrying firearms outside a reservation and prohibited the sale of intoxicating liquors to Indians. *Id.* Only taxpayers could vote in certain elections, which disfranchised most Indians living on reservations. 1933 Mont. Laws 23rd Sess., Chap. 101 at 551-52. After Indians were given the right to vote by federal law, the state adopted burdensome registration and purge laws, 1937 Mont. Laws, 25th Sess., Chap. 147 § 562 at 476-77, and required registrars to be taxpayers. *Id.* at Chap. 172 at 523-27. Until 1941, state law prohibited the establishment of voting precincts "within or at the premises of any Indian agency or trading post." 1941 Mont. Laws, Chap. 8.

The state legislature itself has acknowledged that

Indians in

> Montana have been driven from their native valleys and plains and are at present living and residing upon reservations set apart . . . and by virtue of said isolation and supervision by the federal government, great problems of economic and social significance have arisen and presently exist, and that no suitable progress has been made to solve such problems.

1951 Mont. Laws, 32nd Sess., Chap. 203 at 489-83. The legislature further noted that "Indians of Montana are now subjected to various discriminatory laws . . . under which our first Americans are denied rights enjoyed by their fellow citizens of other races." *Id.* at 752-53. The legislature has described the "suffering, great hardship and poverty" of Montana Indians as an "embarrassment and disgrace." 1957 Mont. Laws, 35th Sess., at 768-70. The conditions under which Indians lived were said to be "deplorable and far below the standards of the rest of the state" in housing, safety, health, decency, and employment. 1969 Mont. Laws, 41st Sess., at 1166-68. The Fort Belknap Indian community faced "serious financial difficulty." 1974 Mont. Laws, 43rd 2d Sess., at 1666-67. Indian children were "caught in a network of mutually reinforcing handicaps ranging from material poverty to racism, illness, geographical and social isolation, language and cultural barriers, and simple hunger." 1975 Mont. Laws, 44th Sess., at 1723-24.

The court of appeals in *Old Person* acknowledged that:

> There was a history of discrimination by the federal government and the State of Montana from the 1860s until as recently as 1971. American Indians have a lower socio-economic status than whites in Montana; these social and economic factors hinder the ability of American Indians in Montana to participate fully in the political process.

230 F.3d at 1129.[11]

The courts below were well aware of the history of discrimination and racial bias towards Indians from the white majority and took it into account in finding a violation of Section 2. However, there is no requirement under Section 2 that a plaintiff prove that racial bias is in fact the cause of polarized voting. The Court held in *Gingles*, 478 U.S. at 62-3, that "[f]or purposes of § 2, the legal concept of racially polarized voting incorporates neither causation nor intent. . . . [T]he reasons black and white voters vote differently have no relevance to the central inquiry of § 2."[12] The lower courts have consistently applied this standard. *See Ruiz v. City of Santa Maria*, 160 F.3d 543, 549 (9th Cir. 1998) ("Section 2 'requires proof only of a discriminatory result, not of discriminatory intent'" (*quoting Smith v. Salt River Project Agr. Imp. and Power Dist.*, 109 F.3d 586, 594 (9th Cir. 1997)); *Collins v. City of Norfolk, Va.*, 816 F.2d 932, 935 (4th Cir. 1987) ("racially polarized voting looks only to the difference between how majority votes and minority votes were cast; it does not ask why those votes were cast the way they were, nor whether there were other factors present in contested elections"); *Sanchez v. State of Colorado*, 97 F.3d at 1315-16 (the district court erred in adopting the "mistaken view that why voters vote a certain way answers *Gingles*' question about the existence of racial bloc voting").

There is nothing, moreover, in *Whitcomb v. Chavis*, 403 U.S. 124 (1971), which dismissed a challenge to multi-member districts in Indiana, that requires a plaintiff to prove, as the

---

[11]The court in *Windy Boy* made similar findings: "Indians have lost their land, had their economics disrupted and have been denigrated by the policies of the government at all levels. . . . Reduced participation and reduced effective participation of Indians in local politics can be explained by many factors . . . but the lingering effects of past discrimination is certainly one of those factors." 647 F.Supp. at 1016-017.

[12]Justice O'Connor, while she believed that causation could be relevant to the overall vote dilution inquiry, agreed that "defendants cannot rebut this showing [of political cohesion and legally significant white bloc voting] by offering evidence that the divergent racial voting patterns may be explained in part by causes other than race." 478 U.S. at 100.

county contends, that white bloc voting is caused by racial bias in order to establish vote dilution under Section 2. First, the claim in *Whitcomb* was based exclusively upon the equal protection clause of the Fourteenth Amendment, and the Court stressed that there was a lack of evidence that the challenged districts "were conceived or operated as purposeful devices to further racial or economic discrimination." 403 U.S. at 149. Second, the results test codified in Section 2 was taken, not from *Whitcomb*, but from *White v. Regester*, 412 U.S. 755, 766 (1973), S.Rep. No. 417 at 2, 28, which invalidated multi-member districts in Texas because they denied minorities the equal opportunity "to participate in the political processes and to elect legislators of their choice." Third, the legislative history of the amendment of Section 2 provides that "the specific intent of this amendment is that the plaintiff may choose to establish discriminatory results without proving any kind of discriminatory purpose." S.Rep. No. 417 at 28. One of the primary reasons Congress rejected the intent test was because it "is unnecessarily divisive because it involves charges of racism on the part of individual officials or entire communities." *Id.* at 36. Requiring a plaintiff to prove that invidious racial discrimination was the cause of white bloc voting would require that the white community be labeled as racist, would be deeply divisive, and would reintroduce a requirement of showing racial purpose contrary to the intent of Congress in amending Section 2. In *Gingles* the Court made it clear that plaintiffs "need not prove causation or intent in order to prove a prima facie case of racial bloc voting and defendants may not rebut that case with evidence of causation or intent." 478 U.S. at 74.

While plaintiff proved that voting was significantly driven by race, it was not required to do so.

A. The Record Clearly Establishes Political Cohesion

Although the lower court, relying upon *Gingles*, 468 U.S. at 31, correctly held that "a showing that a significant number of minority group members usually vote for the same candidates is one way of proving the political cohesiveness necessary to a vote dilution claim," App. 24, political cohesion

is also established in this case by the common history shared by Indians, including their reservation status, their membership in distinctive tribes, their depressed socio-economic status, their special needs, and their consistent voting patterns. In light of the record before the lower courts, the county's argument, Pet. 28, that there was no non-statistical evidence of political cohesion is frivolous.

VI. The Concurrent Findings by Two Courts Below of a Section 2 Violation Were not "Very Obvious and Exceptional Error"

This Court has held that it "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949). *Accord, Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 841 (1996). In this case, there is no very obvious and exceptional showing that the findings of the courts below of the factors identified in *Gingles*, 478 U.S. at 50-1, and the Senate report, S.Rep. No. 417 at 28-9, as probative of minority vote dilution, as well as its ultimate finding of a Section 2 violation, were erroneous.

As the lower courts found, Indians in Blaine County are geographically compact and politically cohesive within the meaning of *Gingles*. The courts also found that Indian preferred candidates are usually defeated by white bloc voting. While proof of the *Gingles* factors is not conclusive, the Court in *Johnson v. DeGrandy*, 512 U.S. at 1012 and n.10, held that "lack of equal electoral opportunity may be readily imagined and unsurprising when demonstrated under circumstances that include the three essential *Gingles* factors."

In addition to the *Gingles* conditions, the courts below found that plaintiffs proved other factors under the totality of circumstances analysis which demonstrated that the at-large system violated Section 2. Those factors included: a history of official discrimination against Indians; racially polarized voting; voting procedures which enhanced the opportunities for discrimination against Indians; depressed socio-economic conditions of Indians; a tenuous justification for the at-large

system; and the absence of Indians from elected office. App. 4, 31-33, 54-57.

As is apparent, there is no merit to the county's erroneous claim, Pet. at 22, that the lower court relied upon only two of the Senate factors in finding a Section 2 violation. To the contrary, the court of appeals, citing *Gingles*, 478 U.S. at 45, correctly held that "the ultimate 'question whether the political processes are equally open depends upon a searching practical evaluation of the past and present reality, and on a functional view of the political process.'" App. 10.

There is no very obvious and exceptional showing that the findings of the lower courts of a Section 2 violation were error. Under the circumstances, the petition for a writ of certiorari should be denied.

CONCLUSION

For the foregoing reasons, private respondents respectfully request that the petition for writ of certiorari be denied.

Respectfully submitted,

LAUGHLIN McDONALD
Counsel of Record
NEIL BRADLEY
BRYAN SELLS
MEREDITH E. B. BELL
ACLU Foundation, Inc.
2725 Harris Tower
233 Peachtree Street
Atlanta, Georgia 30303
(404) 523-2721

Jim Vogel
P.O. Box 525
Hardin, Montana 59034

Counsel for Private Respondents

APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF MONTANA
GREAT FALLS DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. BLAINE COUNTY, MONTANA, et al., Defendants.	CV-99-122-GF-PMP Minutes of the Court Dated: April 16, 2002

Present: THE HONORABLE PHILIP M. PRO, United States District Judge

DEPUTY CLERK: Donna Andrews REPORTER: Erica Davis

COUNSEL FOR PLAINTIFF: Christopher Coates, Sabrina Whitehead Jenkins

COUNSEL FOR DEFENDANTS: J. Scott Detamore

COUNSEL FOR INTERVENORS: Laughlin McDonald

PROCEEDINGS: TELEPHONIC HEARING ON INTERVENORS MOTION FOR LEAVE TO INTERVENE AFTER JUDGMENT AS PLAINTIFFS

10:00 a.m. Court convenes. Counsel are present telephonically.

The Court hears the representations of counsel on the Motion to Intervene.

The Court places its findings of fact on the record.

IT IS ORDERED the Motion for Leave to Intervene is **granted** for purposes of the remedy phase of the trial; and any

appeal with respect to the remedy phase of the trial only.

The Court confers with counsel on the status of the redistricting.

10:15 a.m. Court adjourns.

LOU ALEKSICH, JR., CLERK
By

Donna Andrews
Deputy Clerk